SUPREME COURT, U. S.

DEC 5 1967

JOHN F. DAVIS, CLERK

No. 886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DANIEL E. ARMEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Petition for writ of certiorari to the Supreme Court of the United States	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement of the Case	4
Reason for granting this Writ	9
Argument	9
Conclusion	16
Appendix A	17
Appendix B	20
Appendix B-1	23
Appendix C	24
Appendix D	25

Table of Cases Cited

Anderson vs. U.S.	10
Barton vs. U.S.	10
Berger vs. U.S.	1[illegible]
Bullock vs. U.S	10
Edwards vs. U.S.	14
Schaffer vs. U.S.	10
Singer vs. U.S.	15

Constitutional Provisions and Statutes Cited

United States Constitution, Amendment V	9, 12
15 USC 77q (a)	4
18 USC 1341	4
18 USC 371	4

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Daniel E. Armel, petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the case of United States of America vs. Daniel E. Armel on September 21, 1967, being Case Number 17,410.

OPINIONS BELOW

The Journal Entry of judgment of conviction of the United States District Court for the Southern District of Ohio (Western Division) is unreported and is printed herein as Appendix A.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 21, 1967. The jurisdiction of the Court is involved under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

QUESTION No. 1

WAS THE PETITIONER AFFORDED DUE PROCESS OF LAW AS GUARANTEED TO HIM BY AMENDMENT V OF THE UNITED STATES CONSTITUTION WHEN HE WAS REPEATEDLY REQUIRED TO CONTINUE STANDING TRIAL AND HIS MOTIONS FOR SEVERANCE WERE DENIED AFTER:

A. SIX JOINTLY-INDICTED CO-DEFENDANTS WERE SEVERED OUT ONE AT A TIME, THREE AFTER THE JURY WAS IMPANELED.

B. ONE JOINTLY-INDICTED CO-DEFENDANT WAS TOO ILL TO APPEAR IN THE COURTROOM TO STAND TRIAL, THUS DEPRIVING PETITIONER OF THE TESTIMONY OF A KEY MATERIAL WITNESS.

C. THE LEGAL COUNSEL UPON WHOM PETITIONER RELIED, A JOINTLY INDICTED CO-DEFENDANT, WAS GRANTED SEVERANCE AFTER SITTING IN THE PRESENCE OF THE JURY FOR TEN DAYS, PARTICULARLY SINCE SUCH COUNSEL WAS ACQUITTED AS A MATTER OF LAW AFTER THE VERDICT AGAINST PETITIONER.

QUESTION No. 2

WAS THE PETITIONER DEPRIVED OF A SUBSTANTIAL RIGHT WHEN THE APPELLATE COURT PERMITTED THE RESPONDENT TO AMEND AND

SUPPLEMENT THE RECORD OF THE TRIAL COURT CERTIFIED TO THE COURT OF APPEALS AFTER PETITIONER HAD POINTED OUT A FATALLY DEFECTIVE ERROR IN THAT CERTIFIED RECORD.

QUESTION No. 3

WAS THE PETITIONER AFFORDED A FAIR TRIAL IN LIGHT OF THE TOTAL TRIAL ATMOSPHERE WHEN:

A. SIX OR HIS SEVEN JOINTLY-INDICTED CO-DEFENDANTS SLIPPED QUIETLY FROM THE SCENE WHILE THE RESPONDENT CONTINUED TO BUILD PETITIONER AS THE "MASTERMIND OF A GIGANTIC SWINDLE".

B. A GOVERNMENT WITNESS TESTIFIED THAT HE HAD BEEN REQUESTED NOT TO INCLUDE EVIDENCE FAVORABLE TO THE PETITIONER BY COUNSEL FOR THE GOVERNMENT.

C. THERE WAS NOT A SINGLE MEMBER OF THE JURY PANEL WITH ANY BACKGROUND EXPERIENCE IN THE HIGHLY TECHNICAL AND COMPLICATED QUESTIONS INVOLVED IN THE TRIAL OF THE PETITIONER.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V.
2. Title 15, U.S.C. 77 q (a).
3. Title 18, U.S.C. 1341.
4. Title 18, U.S.C. 371.

STATEMENT OF THE CASE

The defendant-appellant, Daniel E. Armel, was tried to and convicted by a petit jury on March 3, 1966 on twenty-two counts of a purported indictment originally containing thirty counts charging him with violating 15 U.S.C. 77q (a) in the first sixteen counts, and with violating 18 U.S.C. 1341 in counts seventeen through twenty-nine inclusive, as well as one count of violating 18 U.S.C. 371. Seven individuals, including the petitioner, and one corporation were jointly named as defendants in said indictment, as set forth later herein.

On September 21, 1967, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. It is for a review of this judgment a Writ of Certiorari is hereby sought.

The facts upon which this case arose encompass a series of business and factual transactions covering a period of approximately thirteen years (1950-1963). In approximately 1950, the petitioner, Daniel E. Armel, along with others, became engaged in a corporate enterprise which became known as Certified Credit Corporation. Its basic operation, in the beginning and for several years thereafter, was the operation of finance companies and their branches.

Over a period of years, through the acquisition of stock interests, and through mergers, subsidiaries, affiliated companies, and holding companies, which eventually totalled more than sixty (60) active and dormant corporations, Certified Credit Corporation became the parent corporation of a widespread and highly diversified financial structure consisting of a finance company division, real estate division, insurance division, and motel division. The United States has alleged that sales of stock to the public totaled in excess of six million dollars ($6,000,000.00).

The petitioner herein was an organizer, an officer, a director, and a stockholder of Certified Credit Corporation. Through inter-locking directorates, petitioner was also an officer, a director, and a stockholder of many or most of the subsidiary and the affiliated companies. In the late 1950's, the petitioner became president of Certified Credit Corporation, and in the early 1960's, he became Chairman of the Board thereof.

Literally from its inception, and during the entire thirteen years of the existence of Certified Credit Corporation, legal counsel therefor was employed principally in the person of Joseph B. DeVennish, a practicing attorney in Columbus, Ohio, and his law firm, DeVennish and Hague. Outside counsel were also consulted on special matters, including Squire, Sanders and Dempsey, of Cleveland, Ohio; Wadden, Williams, and Stein of Washington, D. C.; and Frank C. Fourney of Texas.

Joseph B. DeVennish, principal counsel, was named as co-defendant in the purported indictment herein.

In addition to legal counsel, Certified Credit Corporation employed Hathaway and Hathaway (a firm of Certified Public Accountants of Cincinnati, Ohio, with a branch office in Columbus, Ohio) to audit the company's books, transactions, annual reports, etc. Two of the partners of that firm, Chester Hathaway and Donald Hathaway, as well as an employee of the firm, Jack Singleton (also a Certified Public Accountant) were also named as co-defendants in the purported joint indictment.

Robert Savage, also a jointly-indicted defendant, became employed as Treasurer of Certified Credit Corporation circa 1957 and when petitioner Daniel E. Armel became Chairman of the Board of Certified Credit Corporation, Robert Savage became President of the Corporation.

Carl Tresemer, also a jointly-indicted defendant, was employed by Certified Credit as Assistant Treasurer, and when Savage became President, Tresemer became Treasurer of Certified Credit Corporation.

About 1959, some of the principals of Certified Credit Corporation, along with others, organized Commonwealth Securities Corporation, one of whose purposes was to sell securities (stock and thrift plan certificates) of Certified Credit Corporation and its subsidiaries. This corporation was the jointly-indicted corporate defendant.

During the course of the trial, it was the contention of the United States of America that this entire corporate structure was a fraudulent scheme from its very inception and that the "gigantic stock swindle" resulted in a loss of millions of dollars to the stockholders and holders of thrift plan certificates. It was the contention of the defendant Daniel E. Armel that there was not any intent to defraud, but that rather there was a too rapid over-expansion in an attempt to reach a solidified corporate structure and that before consolidation efforts could be completed to bring about the planned end result of years of effort, certain civil legal proceedings caused a collapse of the structure itself.

The government contended that in 1958-1959-1960-1961 Certified Credit Corporation was a "paper empire"; the defendant contended that by 1962, visible and tangible evidence of the fruition of this long plan was in existence.

Certified Credit Corporation became defunct in 1963 with a receivership and trustees.

In March, 1965, a Federal Grand Jury returned a purported indictment naming as defendants the above-referred to seven individuals and one corporation.

After a motion for relief of prejudicial joinder of defendants was overruled on December 6, 1965, (R.—Docket en-

tries May 12, 1965 and December 6, 1965) jointly-indicted Carl Tresemer (referred to above) entered a plea of guilty to two of the thirty counts of the indictment. Sentencing was deferred. (R.—Docket entry December 29, 1965.)

On January 7, 1966, jointly-indicted Robert Savage entered a plea of guilty to two of the thirty counts. Sentencing was deferred. (R.—Docket entry January 7, 1966.)

Prior to the commencement of trial, on February 8, 1966, motion for severance by defendant Armel was denied. On the same date it was represented to the Court that jointly-indicted defendant Chester Hathaway (a key witness for the defense) was seriously ill and could not be present. A renewed motion for severance of defendant Armel was overruled, as well as his motion against proceeding in Chester Hathaway's absence. (Tr., pages 8, 9.) The jury was then impaneled and the trial commenced with the four remaining individual defendants (each represented by counsel) physically present and the corporate defendant not represented by anyone, either officer or counsel.

On the fifth day of trial, jointly-indicted co-defendants Donald Hathaway and Jack Singleton entered pleas of guilty to one count of the indictment; sentencing was deferred; and they left the Courtroom. (Tr., pages 289 through 292.

At this stage of the proceedings, defendant Armel's motion for severance and motion to discontinue the proceedings based upon prejudicial effect upon the jury were again overruled. (Tr., page 293.) The trial continued with only the defendants Armel and DeVennish physically present in the courtroom, and Commonwealth Securities Corporation, in absentia and unrepresented.

On the 11th day of trial, at the end of the government's case, co-defendant DeVennish's motion for severance and separate trial was sustained. (Tr., pages 971, 972.) His mo-

tion for judgment of acquittal was taken under advisement. Again, defendant Armel moved for a continuance from proceeding further, which again was overruled. (Tr., pages 966, 1053, 1054.)

The defense was presented with defendant Armel now completely alone in the courtroom, and in due course the jury returned a verdict of guilty on twenty-two of the original counts.

The sentencing of all defendants except Chester Hathaway and Joseph DeVennish occurred on April 15, 1967. Defendants Savage, Tresemer, Donald Hathaway, and Singleton received light sentences. Defendant Armel received a sentence of mixed concurrent and consecutive sentences adding up to a minimum of fifteen (15) years incarceration. (Appendix A.)

Having been severed as a co-defendant during trial at the end of the government's case, highly prejudicially to the defendant Armel, Joseph B. DeVennish, the legal counsel for Certified Credit Corporation upon whom petitioner Armel relied, and who sat through some eleven days of trial physically present in the presence of the jury only to be then severed out, was acquitted AS A MATTER OF LAW of each and every charge upon which he and the defendant-petitioner were jointly indicted and jointly tried. Such acquittal came after the verdict and the sentencing of defendant-petitioner Armel. (Appendix C.)

A motion for new trial was overruled, and an appeal was taken to the Court of Appeals for the Sixth Circuit.

One subsequent development was, as shown by the opinion of the Court of Appeals (Appendix B), that the record certified by the trial court to the Court of Appeals was fatally defective in that no valid indictment was contained therein. After this was pointed out by defendant-appellant in that Court (Petitioner herein), Respondent filed a supplemental record some two weeks later.

REASON FOR GRANTING THIS WRIT

The United States Court of Appeals for the Sixth Circuit, by affirming the judgment of the trial court, and the trial court, have, upon execution of the sentences deprived the petitioner of his liberty without due process of law, guaranteed to him by the United States Constitution, Amendment V.

ARGUMENT

QUESTION NO. 1.

WAS THE PETITIONER AFFORDED DUE PROCESS OF LAW AS GUARANTEED TO HIM BY AMENDMENT V OF THE UNITED STATES CONSTITUTION WHEN HE WAS REPEATEDLY REQUIRED TO CONTINUE STANDING TRIAL AND HIS MOTIONS FOR SEVERANCE WERE DENIED AFTER:

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B. ONE JOINTLY-INDICTED CO-DEFENDANT WAS TOO ILL TO APPEAR IN THE COURTROOM TO STAND TRIAL, THUS DEPRIVING PETITIONER OF THE TESTIMONY OF A KEY MATERIAL WITNESS.

C. THE LEGAL COUNSEL UPON WHOM PETITIONER RELIED, A JOINTLY-INDICTED CO-DEFENDANT, WAS GRANTED SEVERANCE AFTER SITTING IN THE PRESENCE OF THE JURY FOR TEN DAYS, PARTICULARLY SINCE SUCH COUNSEL WAS ACQUITTED AS A MATTER OF LAW AFTER THE VERDICT AGAINST PETITIONER.

Counsel for petitioner is fully cognizant of the general principles of law, laid down in many cases by this and other Honorable Courts which regard and hold the granting or denial of a motion for severance in the ordinary case as being a matter solely for the discretion of the trial court, but we contend that the series of events commencing December 8, 1965 up to and including August 8, 1966, as it relates to the question of severance are so unusual as to wholly remove the instant case from the purview of this general principle.

We earnestly contend that the facts of this case fall squarely within the purview of those cases which hold that the granting or denial of a motion for severance is a matter wholly within the discretion of the trial court *in the absence of an abuse of discretion.* See *Anderson* -vs- *United States,* 270 Fed. 2d 124 (CCA-6); *Bullock* -vs- *United States,* 265 Fed. 2d 683 (CCA-6), certiorari denied 360 U. S. 909.

This qualification goes even one step further, as pointed out in two fairly recent cases which we strongly commend to the Court's attention as applicable to the instant case, not on their facts, but upon the cogency of the reasoning set forth therein.

One of these cases is that of *Barton* -vs- *United States,* 263 Fed. 2d 894 (USCA - Texas, 1959), where the Court held that although a district court has discretion to grant or deny a severance, and its ruling is subject to review only for abuse of discretion, district Courts must nonetheless be alert to accord to every defendant a completely fair trial.

The second case to which we refer is that of *Schaffer -vs- United States,* 362 U. S. 511, where at pages 515-516 the Court stated:

"In short, the proof was carefully compartmentalized as to to each petitioner. The propriety of the joinder prior to the failure of proof of conspiracy was not assailed.[4] When the Government rested, however, the petitioners filed their motion for dismissal and it was sustained as to the conspiracy count. The petitioners then pressed for acquittal on the remaining counts, and the court decided that the evidence was sufficient on the substantive counts. The case was submitted to the jury on each of these counts, and under a charge which was characterized by petitioners' counsel as being "extremely fair." This charge meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were "not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant."

Petitioners contend that prejudice would nevertheless be implicit in a continuation of the joint trial after dismissal of the conspiracy count. They say that the resulting prejudice could not be cured by any cautionary instructions, and that therefore the trial judge was left with no discretion. Petitioners overlook, however, that the joinder was authorized under Rule 8 (b) and that subsequent severance was controlled by Rule 14, which provides for separate trials where "it appears that a defendant . . . is prejudiced . . . by such joinder for trial . . . ." It appears that not only was no prejudice shown, but both the trial court and the Court of Appeals affirmatively found that none was present. We cannot say to the contrary on this record. Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice."

While the Court found in the Schaffer case that severance was not improperly denied, the Court also reinforced

in no uncertain terms the basic principle that the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear, and where the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice.

Discounting for the sole purpose of this argument all of the prejudice to the petitioner which must have resulted from the severance of the first five individual defendants, but repeated overrulings of petitioner's motion for severance, one can only assume the impact on the jury when, on the eleventh day of trial, defendant DeVennish, the legal counsel upon whom the petitioner had relied, was afforded a separate trial and left the courtroom. (Tr., pages 971, 972.) The subsequent acquittal of DeVennish as a matter of law (Appendix C.) clearly shows that when DeVennish was excused from the courtroom the petitioner was stripped of his last vestige of a fair trial and due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

In advancing the defense of advice of counsel, upon which the trial court properly charged, petitioner was hampered by the fact that the counsel upon whose advice defendant-appellant relief, sat as a co-defendant, charged with conspiracy, then severed as a defendant, and later acquitted as a matter of law. His severance was prejudicial enough; his subsequent acquittal after it was too late to bring it to the jury's attention before their verdict was so highly prejudicial as to deprive defendant-appellant of due process of law. If the counsel — jointly indicted and sitting as a co-defendant — was innocent as a matter of law after the verdict, he was just as surely innocent as a matter of law at the end of the evidence — and this point could have been so argued. The defense could thus have availed itself more

fully of the defense of advice of counsel — rather than to sit through the remainder of the trial before a jury under the impression that the "conspirator" lawyer would be tried separately later.

The prejudice of eleven days of joint trial was there — the trial court had a clear duty at that point to grant the petitioner's motion to discontinue the proceedings and be tried separately. The trial court's failure to do so was a patent abuse of discretion, highly prejudicial to the petitioner, and constituted a denial of a fair trial and a deprivation of due process of law.

QUESTION NO. 2.

WAS THE PETITIONER DEPRIVED OF A SUBSTANTIAL RIGHT WHEN THE APPELLATE COURT PERMITTED THE RESPONDENT TO AMEND AND SUPPLEMENT THE RECORD OF THE TRIAL COURT CERTIFIED TO THE COURT OF APPEALS AFTER PETITIONER HAD POINTED OUT A FATALLY DEFECTIVE ERROR IN THAT CERTIFIED RECORD.

The record in this case clearly demonstrates that the record of the United States District Court which was certified to the United States Court of Appeals for the Sixth Circuit did not contain a valid indictment or a copy of a valid indictment upon which the petitioner stood trial. This matter was presented to the Appellate Court as Question No. 1 since it goes to the very fundamental question of jurisdiction. The purported indictment certified as "the indictment" was fatally defective.

The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard, as specifically provided by Rule 15 (1) and (2) of the United

States Court of Appeals for the Sixth Circuit. Although based upon a different fact situation, this principle of law was reinforced by this Honorable Court in *Edwards* -vs- *United States*, 312 U. S. 473.

Despite this, the Respondent amended and supplemented the certified record by filing a purported valid indictment some two weeks after the petitioner had argued the jurisdictional question.

The Appellate Court thereupon summarily dismissed petitioner's argument on the jurisdictional question as "wholly without merit" based upon its review of the "supplemental record." (Appendix B)

We respectfully submit that jurisdiction, once lost, is difficult if not impossible to restore. Doing so by "finding" a valid indictment after the fatal defect was brought to the attention of the Court by an adversary party would certainly deprive the petitioner of a substantial right.

We respectfully submit this question for review by this Honorable Court.

QUESTION NO. 3.

WAS THE PETITIONER AFFORDED A FAIR TRIAL IN LIGHT OF THE TOTAL TRIAL ATMOSPHERE WHEN:

A. SIX OF HIS SEVEN JOINTLY-INDICTED CO-DEFENDANTS SLIPPED QUIETLY FROM THE SCENE WHILE THE RESPONDENT CONTINUED TO BUILD PETITIONER AS THE "MASTERMIND OF A GIGANTIC SWINDLE."

Aside from the due process of law phase of this question, contained in the argument on Question No. 1 herein, we earnestly submit that the repeated severances of jointly-indicted co-defendants — and the repeated denial of peti-

tioner's request for severance and separate trial — created an overall atmosphere in the trial court which was highly prejudicial to the right of the petitioner to receive a fair trial.

While the fact that the two co-defendants who entered guilty pleas before trial and were then severed out was brought out in their testimony, the reason why others were severed out remained a matter of speculation for the jury, other than that counsel DeVennish would be tried separately later. He was later acquitted as a matter of law.

No word picture would suffice to accurately portray the effect of requiring the petitioner to proceed with his defense after all of his co-defendants had quietly slipped from the courtroom for one reason or another, and the total atmosphere of his trial became radically changed.

B. A GOVERNMENT WITNESS TESTIFIED THAT HE HAD BEEN REQUESTED NOT TO INCLUDE EVIDENCE FAVORABLE TO THE PETITIONER BY COUNSEL FOR THE GOVERNMENT.

In *Singer* -vs- *United States,* 380 U. S. at page 37, this Honorable Court echoed the sentiment expressed in *Berger* -vs- *United States,* 295 U. S. 78 at page 88 that "the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with 'a twofold aim — that guilt shall not escape or innocence suffer'."

In the instant case, after a key government witness testified as to numerous financial transactions covering the years from 1950 through 1961, the tenor of which was detrimental to petitioner, the witness testified on cross-examination that he did not include the relevant transactions for the year 1962, which would have been beneficial to

the petitioner's case, because the government attorney requested him to include only transactions through 1961 (Tr. 266, 267, 319).

We raise the question as to whether this falls within the principle of the Berger and Singer cases, supra.

C. THERE WAS NOT A SINGLE MEMBER OF THE JURY PANEL WITH ANY BACKGROUND EXPERIENCE IN THE HIGHLY TECHNICAL AND COMPLICATED QUESTIONS INVOLVED IN THE TRIAL OF THE PETITIONER.

We respectfully submit that this is a question for consideration upon the merits in the event we are granted that opportunity and cannot be thoroughly presented in a petition for a Writ of Certiorari.

CONCLUSION

We respectfully submit that under the facts and circumstances of this case, the petition for a writ of certiorari should be granted so that the question as to whether petitioner has been afforded a fair trial and due process of law may be reviewed.

Respectfully submitted,
EARL W. ALLISON
Attorney for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA

-vs-

DANIEL E. ARMEL

Judgment

[Filed Apr. 15 4:01 PM 1966]

On this 15th day of April, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a verdict of GUILTY of the offense of

Section 77 (q) (a), Title 15 United States Code
Stock Fraud—counts 2-3-4-5-6-7-8-9-10-11-12-14-15 and 16.
Section 1341, Title 18 United States Code
Use of Mails to Defraud—counts 17-18-19-20-21-27 and 28
Section 371, Title 18 United States Code
Conspiracy—count 30

as charged in twenty-two (22) counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, each count, as to counts 2-3-4-5-6-7-8-9-10-11-12-14-15 and 16, said sentences to be served concurrent with each other.

Five (5) years, each count, as to counts 17-18-19-20-21-27 and 28, said sentences to be served concurrent with each other and consecutive with sentences imposed in counts 2-3-4-5-6-7-8-9-10-11-12-14-15 and 16. Sentences imposed in counts 17-18-19-20-21-27 and 28 to commence at the termination of the period of imprisonment imposed in counts 2-3-4-5-6-7-8-9-10-11-12-14-15 and 16.

Five (5) years, as provided in Section 4208(a)(2), Title 18 United States Code, as to count 30; sentence imposed in count 30 to be served consecutive with sentences imposed in counts 17-18-19-20-21-27 and 28, said sentence imposed in count 30 to commence at the termination of the period of imprisonment in counts 17-18-19-20-21-27 and 28.

IT IS ADJUDGED that the defendant shall become eligible for parole at such time as the Parole Board may determine, in count 30, as provided in Section 4208(a)(2), Title 18 United States Code.

IT IS FURTHER ORDERED that upon motion of the United States Attorney, counts 1-13-22-23-24-25-26 and 29 are hereby DISMISSED.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CARL A. WEINMAN
CHIEF JUDGE, U. S. DISTRICT COURT SDO

The Court recommends commitment to:

R. L. SNELL
JOHN D. LYTER, CLERK
By: R. L. Snell, Deputy Clerk

ORDER

[Filed April 15, 1966]

The motion of defendant Daniel Armel, for a new trial is hereby DENIED.

/s/ CARL A. WEINMAN
CHIEF JUDGE U. S. DISTRICT COURT

APPENDIX B

No. 17410

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL E. ARMEL,

Defendant-Appellant.

ON APPEAL from the U. S. District Court for the Southern District of Ohio.

[Filed September 21, 1967]

Before CELEBREZZE, PECK and McCREE, Circuit Judges.

PER CURIAM. Defendant-Appellant Armel appeals from a conviction on twenty-two counts of a thirty-count indictment charging violation of Title 15 USC §77q(a)[1] Title 18 USC §1341[2] and Title 15 USC §371.[3] Defendant Commonwealth Securities Corporation was also convicted in the same verdict but has not appealed. Defendant Chester Hathaway was not tried on the indictment with the other

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[1] Title 15 U.S.C. 77q(a)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[2] Title 18 U.S.C. 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to

defendants, and before trial, Defendants Tresemer and Savage pleaded guilty to two counts and a *nolle prosequi* was entered concerning them as to the remaining counts. During the course of the trial, Defendants Donald Hathaway and Singleton pleaded guilty to one count and Defendant DeVennish's motion to sever was granted and his motion for acquittal, which had been taken under advisement, was granted after the verdict was returned.

The indictment charged Daniel Armel as the principal officer, and the other individual defendants as accomplices, with organizing the Certified Credit Corporation in 1950 which, under their control and direction, through stock purchases and mergers, obtained control of several other corporations and organized additional companies, the stock issues of which were underwritten by Defendant Commonwealth Securities Corporation. Stock in these other companies was sold to the public and the proceeds of these sales were a source of revenue to Certified Credit Corporation whose annual report had been sent through the United States Mails to prospective customers of the stock of the other companies. These annual reports fraudulently misrepresented the financial condition of the parent company. A sum in excess of six million dollars was thus obtained

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be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] Title 18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

from investors who relied on the represented but false financial growth of the parent company.

Several questions are presented on appeal, the answers to none of which we find require reversal.

The contention that the indictment was fatally defective because it was not endorsed as a true bill and had not been signed by the foreman is utterly without merit since the supplemental record on appeal reveals a legally sufficient document. Equally without merit are the contentions raised in the motion for new trial on the grounds of insufficiency of evidence and error in the charge to the jury.

Appellant also contends that the indictment became fatally defective when the first count was stricken since all the remaining counts re-alleged by reference the allegations in the first 22 paragraphs of the first count.

The record shows clearly that the prosecution merely moved to strike the last numbered paragraph of count one and that the trial judge's ruling struck only that part and the first twenty-two paragraphs remained.

The remaining contentions relate to the claim that appellant's several motions for severance were improperly overruled. The decision to grant or to deny a severance is committed to the discretion of the trial judge. *United States* v. *Vida,* 370 F.2d 759 (6th Cir. 1966); *United States* v. *McKinney,* —— F.2d —— (6th Cir., June 26, 1967).

Indeed, the trial judge had no alternative but to remove from consideration of the jury the question of the guilt of the defendants who pled guilty and to have disclosed the fact of such plea to the jury would have prejudiced the remaining defendants. The trial judge's conduct of this phase of the trial and his cautionary instruction were commendable and we find this contention of appellants to be without merit.

For the foregoing reasons the judgment of conviction is affirmed.

APPENDIX B-1

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17,410

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DANIEL E. ARMEL,

Defendant-Appellant.

BEFORE: CELEBREZZE, PECK and McCREE, Circuit Judges

JUDGMENT

[Filed September 21, 1967]

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
CARL W. REUSS
Clerk

Issued as Mandate:
COSTS:
Filing fee .....$
Printing $
Total $

A True Copy.
Attest:
.....
Carl W. Reuss, Clerk.

APPENDIX C

ORDER
[Filed August 8, 1966]

The defendant Joseph DeVennish, having moved for a judgment of acquittal at the conclusion of the Government's evidence, and the Court having reserved a ruling on the motion pursuant to Rule 29(b) Federal Rules of Criminal Procedure 18 U.S.C., and the Court having considered all the evidence most favorable to the Government at the close of all the evidence in the case, and being otherwise fully advised in the premises, finds said motion well taken, and it is;

THEREFORE ORDERED that the motion of the defendant Joseph DeVennish for a judgment of acquittal be and hereby is SUSTAINED.

It is further ORDERED that the defendant Joseph DeVennish be and he hereby is discharged.

/s/ CARL A. WEINMAN
CHIEF JUDGE - United States
District Court

APPENDIX D

A. AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Title 15 U.S.C. 77q (a)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

C. Title 18 U.S.C. 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

D. Title 18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 886

DAVID E. ARMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on September 21, 1967, and its opinion (Pet. App. B) is reported at 384 F. 2d 51. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to November 20, 1967. An attempt was made to file a typewritten petition for a writ of certiorari on November 21, 1967, without payment of the docket fee. On December 2, 1967, a printed petition was filed and it was actually docketed on December 5, 1967. The petition is thus out of time under Rule 22–2 of the Rules of this Court. In any event, the petition raises no question warranting review by this Court.

Petitioner, along with six other individuals and the Commonwealth Securities Corporation, was charged in

288-539—68

a thirty-count indictment returned in the Southern District of Ohio with the use of mails in a fraudulent scheme to sell securities (15 U.S.C. 77q), mail fraud (18 U.S.C. 1341) and a conspiracy to commit those offenses. After a jury trial, he was convicted on twenty-two counts and was sentenced to imprisonment for a total of fifteen years.

The evidence showed that petitioner was president and later chairman of the board of the Certified Credit Corporation. Between 1950 and 1962, this corporation acquired control of numerous corporations by stock purchases, mergers and the organization of new corporations. The stock issues of the new corporations were sold through the Commonwealth Securities Corporation, which was controlled by petitioner (Tr. 592, 705–706, 717, 1368). In all, including the sale of Certified Credit Corporation's own stock, the securities sold totalled $6,720,000 (Tr. 65–66).

In selling the various stocks issues, the Commonwealth salesmen used an annual report of the Certified Credit Corporation containing a consolidated balance sheet which fraudulently depicted a tremendous financial growth of the corporation (*e.g.*, Tr. 293, 698–699, 880–881). Thus, the consolidated balance sheet for 1961 showed cash and short term receivables of over $5,000,000, when the actual cash was $33,000 and the receivables had no factual basis (Tr. 392–399, 551). In fact, the Certified Credit Corporation never made an operating profit (Tr. 400), and some of the new corporations did no business except to sell their stock and place the funds in Certified Credit Corporation (*e.g.*, Tr. 28, 39, 46).

1. Of the six other individual defendants, two pleaded guilty before trial and testified as government witnesses (Tr. 375, 573), and another defendant was not tried because of ill health and old age. At the conclusion of the testimony of the first government witness, two other defendants pleaded guilty outside the presence of the jury (Tr. 288). The court thereafter admonished the jury that the disposition of the case against these two defendants should not be considered as affecting in any way the guilt or innocence of the remaining defendants (Tr. 292). At the conclusion of the government's case, the court sustained the motion for a severance by the other individual defendant, Joseph DeVennish, and reserved its ruling on DeVennish's motion for judgment of acquittal (Tr. 969–971). It told the jury only that it had ruled that DeVennish should have a separate trial (Tr. 972).[1]

Petitioner was not prejudiced by the fact that he was the only individual defendant whose case was submitted to the jury. Neither at trial nor now does he point to specific evidence admissible solely against his codefendants which might have prejudiced him before the jury. Nor did the court abuse its discretion in refusing to delay the trial because of the illness of codefendant Chester Hathaway. Petitioner, who stated only that Hathaway was a material witness, did not specify what testimony he expected to elicit from Hathaway. He also did not request leave to take Hath-

[1] Five months after the verdict, the court sustained the motion of DeVennish for judgment of acquittal.

away's deposition under Rule 15 of the Federal Rules of Criminal Procedure.

The fact that two codefendants entered guilty pleas shortly after the trial commenced did not prejudice petitioner since the pleas were not taken in the presence of the jury. Nor is there basis for complaint in the fact that the trial court did not acquit his codefendant DeVennish during the trial and so inform the jury. The court did instruct the jury that petitioner could not be held criminally responsible for any actions that he took in a good-faith reliance on the advice of counsel, even if the advice was erroneous, provided he had made full disclosure of the facts to counsel (Tr. 1459–1460). This instruction clearly presented petitioner's defense of reliance on advice of counsel.[2]

2. Since the annual reports of the Certified Credit Corporation were at the heart of the fraudulent scheme and none was prepared for 1962, the S.E.C. analyst who examined the records of the Certified Credit Corporation and its subsidiaries prepared a complete financial analysis only through the year 1961 (Tr. 266–267, 319, 369–370). The witness was, however, able to testify to changes which occurred in 1962.[3] It

[2] There is no merit to the contention that the court of appeals had no authority to supplement the record with the original indictment, which refuted petitioner's argument on appeal that a valid signed indictment had not been returned by the grand jury.

[3] For example, after he stated that Certified Credit and Thrift Company of Ohio, a subsidiary formed in 1959, did little or no business, he testified that in 1962 it followed its prospectus and acquired an office building. He also said that it acquired the building from money which it had previously transferred to the parent corporation (Tr. 46–47, 262–265).

is clear, therefore, that the government did not suppress any testimony favorable to the defense. Moreover, petitioner was not precluded from obtaining his own analyst to examine the records.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968